

NOTES FROM 10/18/2005 PUBLIC MEETING
PROPOSED FAR AMENDMENTS
T&M CONTRACTING
FAR Cases 2003-027 and 2004-015

This document is a compilation of notes taken on the flip charts in the front of the auditorium during the public meeting to discuss the two proposed FAR amendments on Time and Material contracting, FAR Cases 2003-027 and 2004-015. These notes are not comprehensive of all the statements made by all of the participants, but rather they are an attempt to capture the tone of the statements made by public participants.

D&F's

- D&F requirements necessary prior to use of a T&M or Labor Hour contract include a requirement that the action be in the best interests of the Government.
- The D&F requirements of the rule will likely have a chilling effect on the use of T&M contracts because the D&F must show/prove that FFP is not appropriate.
- D&F requirements in the FAR rule are too tight. They will cause a chill in use of T&M contracting.
- D&F requirements appear to ignore necessities of some circumstances; for example when control of funds dictates immediate and flexible contracting.
- The requirement that T&M D&F's show that FFP contracting is "not possible" is too tight.
- Is a D&F needed for use of T&M when the T&M item is on a contract that also includes a FFP item? Yes. It is needed both on a single contract of that type and on an individual order under a contract of that type.
- Contractors are not trying to avoid FFP contracts. FFP contracts yield higher profits and give more flexibility to contractors to solve contract performance issues. The SARA statute says that T&M contracts for commercial items must be awarded using competitive procedures and there are therefore safeguards built in on use of T&M.
- Under non-commercial item T&M contracts, why does the proposed rule D&F requirement address only a total contract D&F and not address an order by order situation like under commercial items?
 - However, it is rare to see IDIQ's that provide only for award of T&M/LH orders.
 - Seemed to be endorsement of CO approval of order D&F's.

OVERKILL

- The T&M/LH rules are overkill administratively.
 - Their extensive requirements and procedures conflict with the needs for use of T&M/LH contracts; i.e., getting work done by contractors quickly to serve the government's interests.
 - The rules will discourage CO's from using T&M/LH contracts.
 - It will delay meeting requirements.
 - The rules should instead be making the processes simple and remove burdens from CO's.
 - The Government presenters stated that generalities are not useful and that specific recommendations are necessary from the public in order to properly evaluate them.

- Are the requirements for D&F approval above the level of the CO statutory for award of an IDIQ that provides only for award of T&M/LH orders?
 - No. The Councils created that mechanism because an IDIQ contract that provides only for award of T&M/LH orders is very inflexible, does not promote FFP and should be used sparingly.
 - Commenters stated that the CO should be the business manager.

DEFINITION OF MATERIAL

- Subcontractor labor should not be included in the definition of material.
 - It should be included in the category of "Time", unless the subcontract is for supplies.
- Interdivisional work authorizations (IDWA's) should not be in the "M" category, it should be "T".
 - Being in "M" conflicts with the need to get access to contractor commercial labor resources.
 - Material (supplies) transfers are ok, but leave labor transfers out of the definition.
 - The main issue is the inability to pay the prime contract labor hour \$rate for IDWA's.
- Why make the distinction to breakout subcontractors and IDWA separately from "T".
- Regarding IDWA labor, what difference does it make where in the company the labor comes from?
 - This is particularly true when the labor is from the commercial side of the company which has only commercial labor prices.
- Contractor CAS disclosure statements address IDWA procedures.
 - The problem is when the contract clause differs from the contractor disclosure statements.
- We should assume that CAS is not applicable.
 - The clause is a payment rule, not an allocation rule.
 - It is very important to take care of the CAS applicability requirements on commercial item T&M contracts in order to get an exemption. Otherwise, CAS would be applicable.

BEST EFFORTS

- Despite T&M/LH contracts being "best efforts" type contracts, contractors feel accountable for successful completion of performance under T&M/LH contracts.
 - There is also the potential for Termination for Default and poor past performance scores that motivate T&M/LH contractors.
 - There is no need for the subcontract protections built in to the rules.
- There are two classes of T&M/LH contracts:
 - Catalog type services that are pre-packaged standard corporate rates that are the same as are delivered to commercial customers.
 - For this type service, companies will have a very hard time dealing with the subcontract labor protections in the proposed rule.
 - The government should address this class of T&M/LH contracts and seek a better definition for the FAR.
 - Customer specific tasks using commercial methods and employees.

- For this class of T&M/LH contracts, contractors can deal with the subcontract protections, but it will be complicated to do so and will reduce flexibility.
- These complications overtax the government and contractor contracting workforce.
- Past practices were adequate.

GENERAL

- If \$150 per hour is a fair and reasonable price for a Sr. Architect, what difference does it make where that person works?
- Industry commenters are not aware of examples of work not being done properly by subcontractor employees.
- If there is adequate price competition, why do we care if a contractor makes a high profit (from using lower cost subcontractors)? As long as the work gets done and the performance based requirements are met, who cares about whether it is a prime contractor employee or a subcontractor employee who does the work?
- Perhaps it would be useful to put thresholds (such as dollar thresholds) for use of the subcontractor approvals.
 - This would increase flexibility.
- On an order under an IDIQ contract, would each order contain a list of subcontractors approved to be paid at the prime LH rate, or would the list be in the prime contract?
- It is recommended that a notice of a new subcontractor should suffice to authorize the payment at the prime LH rate in lieu of specific approval from the CO.
- We should consider other means of notifications, as long as the Government and contractor agree on matter.
- What happens under the contract if an actual cost subcontractor results in payments that exceed the prime contractor LH rate? Is the excess recoverable.?
 - There is no ceiling on such costs in the clauses.
 - there is no "lower of the 2" rule in the clauses.
- Access to subcontractor records is inappropriate if the subcontractor is not listed for payment at the prime contract LH rate.
 - The only access provided in the clauses is to confirm the labor hours incurred and the qualifications of the person performing the labor.
- If we are willing to pay \$150 per hour, why do we care about the cost of a qualified subcontractor?
 - Subcontractor at \$200/hr.
 - Subcontractor at \$100/hr.
 - Some qualified prime contractor employees and subcontractor employees have different levels of efficiency, which will impact the final price.

Profit

- There is confusion regarding profit in material for commercial items as it impact labor. We need to address that.
 - IDWA labor for standard commercial tasks include profit.
 - We need to address that.

Commercial indirect costs -

- Can they be set at the order level or do they have to be set at the IDIQ level?

Ceiling Price

- If a contractor proceeds at its own risk and works past the ceiling, will the government pay the contractor if \$ become available or will the government exercise its "discretion" and not pay?

Time Card

- What is an "original" time card as used in the clause in this age of electronic and automated systems? Is it an appropriate term to continue using?

Overall concern

- CO's tend to be risk averse and they may be afraid to use the rule and the flexibilities of the rule.
- Should we give guidance on when it ok to add subcontractors to the list for payment at the prime labor rate.
 - The government presenters asked for specific comment on this issue.

Retroactive Rule?

- When these rule go final, will they apply to existing contracts or will they only apply to contracts awarded after promulgation of the rules?
 - The rules will be prospective only.
 - The rules cannot apply to preexisting contracts without amending each contract individually and getting both contractor and government agreement.
- Can existing contracts be modified to incorporate the new clauses?
 - Yes, if it is bilateral.